



OFFICE OF THE DISTRICT ATTORNEY

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October 31, 2019

Rob Davis, Reporter
The Oregonian
1500 SW 1st Ave, Suite 400
Portland, OR 97201

Response via email to: RDavis@oregonian.com

Dear Mr. Davis,

Thank you for your Appeal request in the matter of public records from Douglas County ("the County"), specifically the county commissioners' travel expenses. I received your Appeal request on Friday, October 25, 2019.

On review, I note that several requests were made. You had requested public records previously for which the County did not charge fees. After I conferred with Ms. Tamara Howell, I learned approximately three hours were spent collecting and distributing those public documents where no fees were requested of you (see item #4, below, and a prior request for out of pocket expenses). It appears only one request made on October 10, 2019, relating to items 1, 2, and 3, resulted in a request for fees prior to distribution of the requested materials. I note that the request was for:

1. Expenses occurring during each fiscal year beginning from 2015 up to the present and into the current fiscal year, 2019-20, a six-year period;
2. An accounting of the Title III Educational Travel Grant since 2016, a four year period;
3. All reimbursements expenses submitted by commissioners in 2019;
4. Annual Summaries of certifications submitted to the BLM and USFS for Title III Funding. (Provided at no charge on October 21, 2019).

The fee request was determined by the County to be as follows: The combined cost for request #1 and #2: \$1,926.50 (upon review, this figure was understated by addition error; it should have been \$1,946.10); and the cost for #3: \$26.50. The total: \$1,972.60. The fees were itemized to

estimate staff time to research, locate and copy the documents to prepare for distribution; the time necessary for administrative review to determine that the documents were properly collected and prepared to meet the request, and lastly, the time necessary for legal review and redaction, as provided in ORS 192.324(4) (a) and (b).

Based on your appeal letter dated October 24, 2019, I note you have two particular appeal issues: (1) Whether the fee of \$1,953.00 is an estimated amount reasonably calculated to reimburse the County for its actual costs; and (2) Whether the County's decision to deny the fee waiver request was reasonable.

1. Was the estimate reasonably calculated to reimburse for actual costs?

I begin with the reasonableness of the calculation of estimated costs for reimbursement. I note that the estimate is just that: an estimate that aids a requestor in determining whether to go forward to obtain the records. "Actual costs" may include a charge for the time spent by the County's staff in locating the requested records; reviewing the records in order to redact exempted material; supervising that inspection to protect original documents; copying records; certifying documents as true copies; and legal review by the County's counsel. In summary, and explained below, I find the County's estimate to be excessive by a nominal amount.

Your request in #1 and #2 requires a review of records spanning a six year period. The request includes locating, collecting, cataloging, and copying records, receipts, and a detailed itemization. For that work, the County has calculated 35 staff hours. That calculation, without knowing the density or extent of the records that will require review, appears objectively reasonable. Your request requires at least six years of records to be researched, sorted and analyzed. Further, documents that meet the request are to be copied, reviewed, analyzed for exempt status, redacted if necessary, certified as accurate, and prepared for distribution to you. Testing the reasonableness of 35 hours, I would expect the copying and preparing the documents for distribution, once collected, catalogued, and redacted if necessary, to be no more than three hours. That would leave 32 hours for researching and identifying the materials from that six year period. When that time is broken down to account for the time necessary for each of the six years it is approximately five hours per year. Approximately five hours for each year of the request is an objectively reasonable amount of time. The estimated hourly rate for that time is \$34.37. That rate is objectively reasonable for the research, analysis and review process detailed above. That rate is objectively reasonable because the research and collection of documents will require the attention and expertise of a staff member who has a sufficient understanding of accounting in order to properly identify and collect the appropriate materials.

An estimate of 32 hours at the rate of \$34.37 totals \$1,099.84. The clerical rate of \$25.00 for 3 hours of copying and preparing the records for review and distribution totals \$75.00. Together they total \$1,174.84. The estimated cost to copy pages at the rate of 25 cents per page, for an estimated 170 pages, at \$42.50 is objectively reasonable.

The County calculates an estimated five hours of work by the department head at a rate of \$96.21 per hour. In the context of State agencies, \$75.00 is the maximum hourly rate for professional review to fulfill Public Records requests. The County, however, is not limited to that maximum.

The County has identified the actual department head as the only individual available and able to conduct that high level review. There is no alternative or equivalent staff person available to perform the review other than the department head and the County may avail itself of the review it deems appropriate to assure the records are complete and properly prepared. For that reason, the County may set forth the actual cost of the specific staff person conducting the review. I find it is an objectively reasonable calculation for an estimate of the actual cost in the matter. The County estimates five hours for that department head review. I find that objectively reasonable as follows: two hours to supervise the staff collecting the documents as that research and collection is taking place, two hours to review and ensure the documents that are collected properly fulfill and are identified as the records requested by you, and one hour to finalize the copied materials, after conferring with legal staff if redactions are necessary, to ensure that the documents are correctly packaged and properly addressed by clerical staff in the manner that they are to be delivered to you. The total estimate is \$481.05. (This includes department head review for item #3 as well as #1 and #2).

The estimated cost of legal review is for three hours at a rate of \$73.20, totaling \$219.60. As an estimate, it appears objectively reasonable for legal review of the estimated 170 pages of records. I note that the legal review may include conferring with the department head to ensure that the records are complete and properly redacted, if redactions are necessary. Legal review of documents at a rate of 50 plus pages an hour is objectively reasonable as an estimate. (This includes the legal review of the documents requested in item #3 as well as #1 and #2).

For item #3, the County estimates copy time by clerical staff at one hour at a rate of \$25.00 per hour. The copy rate is the same as provided above: 25 cents per page, totaling \$1.50. Added together, that estimate totals \$26.50.

Based on the above analysis, the estimate that I find to be objectively reasonable, to collect, prepare, and deliver the documents you request, is \$1,944.49. Again, this figure serves as an estimate so that you can determine whether you desire that the County collect and provide the records to you. If the actual cost to the County is less than the estimate, you would receive a reimbursement.

2. Was the County's decision to deny the fee waiver request reasonable?

Governmental bodies have the discretion to waive fees when the request is in the public interest and benefits the general public. I note that your request meets this standard, which allows the County to use its discretion to waive the fees or reduce them. There is no requirement that the County waive or reduce a fee. However, in exercising its discretion on the matter, the County must exercise it in a manner that is reasonable under the totality of the circumstances.

A public body may consider the following when deciding whether or not to waive or reduce such a fee: (1) the character of the public interest in the particular disclosure, (2) the extent to which the fee impedes public interest, and (3) the extent to which a waiver would burden the public body. In addition to the three factors above, I note that other public bodies have considered the ability of the requestor to pay the fee. I note that, according to the Attorney General's Public Records Manual, it was determined that it was reasonable for state agencies to give a 20 percent

fee reduction for a media requester under circumstances where 56 hours of staff time was needed to fulfill a broad request not tailored to specific files.

In this case, your request at issue was subsequent to other requests for which the County did not assess a fee. The County had provided records without a fee after the expenditure of approximately three hours of staff time. The fee was requested only upon receipt of the broader request for documents, involving up to a six year period and more than 44 hours of staff time necessary to fulfill that request. In essence, you received an up-front waiver of three hours of staff time. Therefore, in my calculation and analysis of the totality of the circumstances, I find a small fee waiver was already made available to you within your succession of requests, including the last item provided, #4, on October 21, 2019.

With regard to the requestor's ability to pay the fee, I note from publically available information¹ that The Oregonian is a privately held company, owned by Advance Publications, headquartered in New York, NY. According to Forbes, as of October 2014, it was ranked as the 44th largest privately held company in the United States. According to those same public resources, revenue was \$2.4 Billion in 2016. I find nothing in the public domain that indicates that the requestor would be unable to pay the fee associated with the requested records. I further note that other media companies have made requests of the County for public documents in 2019, one of which was the local newspaper, the News Review. The News Review primarily provides news services, print and electronic, within Douglas County. In my review of the recent request from that media organization, the County did not waive or reduce fees. The purpose and relevance of my review of other media requests was to confirm that requests from media organizations received comparable action as to fee waivers and/or reduction requests.

Lastly, I reviewed the extent to which a waiver would burden the public body. As noted above, fee waivers or reductions on broader media requests are atypical. Generally, the County estimates a fee, the requestor pays the fee, and the documents are delivered. In some situations, the requestor negotiates with the County to refine the request so as to obtain the essential information that they seek and, in narrowing the scope of the request, avoid or pay a lesser fee. If the County began waiving or reducing fees for media requests in such a way that the costs were not recouped, I would expect that they should treat all media requesters the same. Thus, if the County reduced fees or waived them altogether, cumulatively, that would have a significant impact on its budget and work flow. Your request alone is estimated to take 44 hours of staff time coordinated through multiple staff members. When staff are researching and preparing public records requests, they are not able to attend to the work of the County. When the County's work is not done or not done in a timely manner, members of the local community are adversely affected. I find that the waiver you seek would burden the County.

Weighing all the factors under a totality of the circumstances analysis, I find the County's decision not to waive, or reduce, the estimated fee of \$1,944.49 was reasonable. The waiver requested would burden the County; the Oregonian was given some records up-front without a fee request, effectively a reduced fee; the County applies the same approach to other media requestors including the local paper; and the Oregonian has the financial resources to pay the fee.

¹ Wikipedia, October 29, 2019

Thus, I find that the fee is not an impediment to obtaining the requested records.

Order Pursuant to ORS 192.415

My decision on your Appeal:

- (1) As to whether the fee of \$1,953.00 is an estimated amount reasonably calculated to reimburse the County for its actual costs, the answer is that the fee estimated to reimburse the County for actual costs is to be \$1,944.49. By copy of this decision letter to Douglas County, I order that the estimate for purposes of this public records request be modified consistent with the calculation herein.
- (2) As to whether the County's decision to deny the fee waiver request was reasonable, the answer is that it was reasonable.

That is my decision and order with regard to your issues on appeal. To seek review of my decision and order, you may file for Circuit Court review pursuant to ORS 192.431.

Sincerely,



Jodee Jackson
Senior Deputy District Attorney
Douglas County

cc: Tamara Howell, PIO
Douglas County
Via email: tjhowell@co.douglas.or.us